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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY
AND LIFE ADVOCATES d/b/a NIFLA,
a Virginia corporation; PREGNANCY
CARE CENTER d/b/a PREGNANCY
CARE CLINIC, a California corporation;
and FALLBROOK PREGNANCY
RESOURCE CENTER, a California
corporation,

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General for the
State of California; THOMAS
MONTGOMERY, in his official
capacity as County Counsel for San
Diego County; MORGAN FOLEY, in
his official capacity as City Attorney for
the City of El Cajon; and EDMUND G.
BROWN, JR., in his official capacity as
Governor of the State of California,

Defendants.

Civil No. 15cv2277 JAH(DHB)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS TO DISMISS**
[Doc. Nos. 8, 19, 25, 26]

INTRODUCTION

Currently pending before this Court are Defendants' Xavier Becerra, in his
official capacity as Attorney General for the State of California ("Becerra"), Edmund D.
Brown, in his official capacity as Governor of the State of California
("Brown"),(collectively, "the State Defendants"), Thomas Montgomery in his official

1 capacity as County Counsel for San Diego County (“the County Defendant”), and
2 Morgan Foley, in his official capacity as attorney for the City of El Cajon (“the City
3 Defendant”), motions to dismiss Plaintiffs’ National Institute of Family and Life
4 Advocates d/b/a NIFLA (“NIFLA”), Pregnancy Care Center d/b/a Pregnancy Care Clinic,
5 and Fallbrook Pregnancy Resource Center (collectively, “Plaintiffs”) complaint pursuant
6 to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. See Doc. Nos. 8,
7 19, 25, 26.¹ After a thorough review of the parties’ submissions, the Court **GRANTS IN**
8 **PART** and **DENIES IN PART** Defendants’ motions to dismiss.

9 BACKGROUND

10 Plaintiff NIFLA is a national network of non-profit pro-life pregnancy centers.
11 Plaintiffs Pregnancy Care Clinic and Fallbrook Pregnancy Resource Center are two
12 similarly classified pregnancy centers located in this judicial district. Plaintiffs filed the
13 instant complaint on October 13, 2015. Plaintiffs challenge the constitutionality of
14 California Assembly Bill 775, known as “the Reproductive FACT Act” (“the Act”), which
15 was signed into law on October 9, 2015. Doc. No. 1.

16 The Act imposes two professional notice requirements on clinics (such as Plaintiffs)
17 providing pregnancy-related services. The first notice requirement applies to any clinic
18 that is a “licensed covered facility.” Cal. Health & Safety Code § 123471(a) & (b). The
19 second notice requirement applies to any “unlicensed covered facility.” Id.

20 Section 123471(a) requires licensed covered facilities to provide the following
21 notice:

22 California has public programs that provide immediate free or low-cost access to
23 comprehensive family planning services (including all FDA-approved methods of
24 contraception), prenatal care, and abortion for eligible women. To determine whether you
25 qualify, contact the county social services office at [insert the telephone number].
26 Cal.H&S § 123471(a)(1). This notice must be either posted at the facility, printed for
27 distribution to clients, or provided digitally to be read by clients upon arrival.

28 ¹ When Plaintiffs originally filed suit, Kamala Harris was California's Attorney General. Since that time, Harris has been elected and sworn in to the United States Senate and Xavier Becerra has been sworn in as the 33rd Attorney General of the State of California. Under Federal Rule of Civil Procedure 25(d), a public officer's successor is automatically substituted as a party. The Court therefore substitutes Becerra for Harris.

1 Cal. Health & Safety Code §§ 123472(a)(2)(A)-(C).

2 Section 123471(a) also requires unlicensed covered facilities to clearly and
3 conspicuously “disseminate to clients on site and in any print and digital advertising
4 materials including Internet Web sites” the following notice:

5 This facility is not licensed as a medical facility by the State of California and has
6 no licensed medical provider who provides or directly supervises the provision of services.
Cal. Health & Safety Code § 123472(b)(2)-(3).

7 Facilities covered under the Act that fail to comply with these requirements are
8 liable for a civil penalty of five hundred dollars (\$500) for the first offense and one
9 thousand (\$1,000) for each subsequent offense. Cal. Health & Safety § 123473(a). The
10 prosecuting authority, including the Attorney General, city attorney or counsel, “may bring
11 an action to impose a civil penalty” but only if both of the following has been done:

12 (1) Providing the covered facility with reasonable notice of noncompliance, which
13 informs the facility that it is subject to a civil penalty if it does not correct the violation
within 30 days from the date the notice is sent to the facility.

14 (2) Verifying that the violation was not corrected within the 30-day period
described in paragraph (1).

15 Cal. Health & Safety Code § 123473(a)(1)-(2).

16 On October 21, 2015, Plaintiffs filed a motion for preliminary injunction. Doc.
17 No. 3. On January 28, 2016, the parties appeared before this Court for a hearing on the
18 motion. Doc. No. 45. On February 9, 2016, the Court denied Plaintiffs’ motion for a
19 preliminary injunction. Doc. No. 46. On February 28, 2017, Plaintiffs’ filed an appeal to
20 the Court of Appeals for the Ninth Circuit. Doc. No. 47.

21 On December 28, 2016, the Ninth Circuit affirmed the District Court’s decision
22 Doc. No. 59. The panel addressed Appellants’ justiciability claims before moving to the
23 merits of Appellants’ arguments. (Appellants argued that the Act violated their
24 fundamental rights, including their First Amendment guarantees to free speech and free
25 exercise of religion.)

26 The panel found Appellant’s claims were “constitutionally and prudentially ripe.”
27 The panel also determined that the proper level of scrutiny to apply concerning
28 Plaintiffs’ free speech claim was intermediate scrutiny for licensed clinics, (which the Act

1 survived), and with respect to the unlicensed clinics, any level of scrutiny, (which the Act
2 also survived). Doc. No. 59 at 4. The panel ultimately concluded that the Act was a
3 neutral law of general applicability that survived rational basis review. As such, the Ninth
4 Circuit affirmed this Court's decision that Appellants were unable to demonstrate a
5 likelihood of success on the merits of their First Amendment claims.

6 Currently pending before the Court are Defendants motions to dismiss. Defendant
7 Montgomery filed a motion to dismiss on November 4, 2015. Doc. No. 8. Defendant
8 Foley filed a motion to dismiss on November 9, 2015. Doc. No. 19. Defendant Brown
9 filed a motion to dismiss on November 13, 2015. Doc. No. 25. Defendant Becerra filed
10 a motion to dismiss on November 13, 2015. Doc. No. 26.

11 DISCUSSION

12 I. Legal Standard

13 A. Federal Rule of Civil Procedure 12(b)(1)

14 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant may seek
15 to dismiss a complaint for lack of jurisdiction over the subject matter. The federal court
16 is one of limited jurisdiction. *See Gould v. Mutual Life Ins. Co. v. New York*, 790 F.2d
17 769, 774 (9th Cir. 1986). As such, it cannot reach the merits of any dispute until it
18 confirms its own subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environ.*,
19 523 U.S. 83, 95 (1998). When considering a Rule 12(b)(1) motion to dismiss, the district
20 court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial,
21 resolving factual disputes where necessary. *See Augustine v. United States*, 704 F.2d 1074,
22 1077 (9th Cir. 1983). In such circumstances, "[n]o presumptive truthfulness attaches to
23 plaintiff's allegations, and the existence of disputed facts will not preclude the trial court
24 from evaluating for itself the merits of jurisdictional claims." *Id.* (quoting *Thornhill*
25 *Publishing Co. v. General Telephone & Electronic Corp.*, 594 F.2d 730, 733 (9th Cir.
26 1979)). Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing
27 that jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
28 (1994).

1 **B. Federal Rule of Civil Procedure 12(b)(6)**

2 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
3 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule
4 12(b)(6) where the complaint lacks a cognizable legal theory or fails to allege sufficient
5 facts to support a cognizable legal theory. *Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013).
6 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
7 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
8 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
9 (2007)). A claim is facially plausible when the factual allegations permit “the court to
10 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
11 *Iqbal*, 556 U.S. at 678. In other words, “the non-conclusory ‘factual content,’ and
12 reasonable inferences from that content, must be plausibly suggestive of a claim entitling
13 the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)
14 (citing *Iqbal*, 556 U.S. at 678). “Determining whether a complaint states a plausible claim
15 for relief will . . . be a context-specific task that requires the reviewing court to draw on its
16 judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

17 In reviewing a motion to dismiss under Rule 12(b)(6), a court must assume the
18 truth of all factual allegations and construe the factual allegations in the light most
19 favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38
20 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they
21 are “cast in the form of factual allegations.” *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th
22 Cir. 2003). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of
23 ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at
24 557). The court may consider facts alleged in the complaint, documents attached to the
25 complaint, documents relied upon but not attached to the complaint when authenticity
26 is not contested, and matters of which the court takes judicial notice. *Lee v. City of Los*
27 *Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). If a court determines that a complaint
28 fails to state a claim, the court should grant leave to amend unless it determines that the

pleading could not possibly be cured by the allegation of other facts. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

II. Analysis

Defendant Thomas Montgomery (“the County Defendant”), contends that the Court should dismiss Plaintiffs’ complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. See Doc. 8 at 2. Montgomery argues that Plaintiffs’ claims are not ripe for review and the Court lacks subject matter jurisdiction over the action. *Id.* As a result, Montgomery argues that the complaint fails to state a claim upon which relief can be granted. *Id.*

Defendant Morgan Foley (“the City Defendant”), similarly contends that the Court should dismiss Plaintiffs’ complaint pursuant to Rules 12(b)(1) and 12(b)(6). Foley argues that Plaintiffs’ lack standing to challenge the Act and that their claims are not ripe for review. As a result, Foley argues the Court lacks subject matter jurisdiction. Doc. 19 at 9. In addition, Foley posits that challenges to the Act cannot be brought against Foley as City Attorney for the City of El Cajon as Foley did not draft or enact the Act. Doc. 19 at 11.

Defendant Edmund D. Brown, in his official capacity as Governor of the State of California (“Brown”), also moves to dismiss the complaint on the grounds it fails to state a claim upon which relief may be granted. Defendant Brown also argues that Plaintiffs’ claims are barred by Eleventh Amendment immunity. Doc. 25. Brown contends that the Eleventh Amendment bars suit against a state or its instrumentalities for legal or equitable relief in the absence of consent by the state or an abrogation of that immunity by Congress. Doc 25 at 10. In addition, Brown argues that the Plaintiffs lack standing to sue the governor as they have not alleged a case or controversy sufficient to meet the requirements of Article III. *Id.*

Defendant Kamala Becerra, in his official capacity as Attorney General for the State of California (“Becerra”), moves to dismiss Plaintiffs’ complaint pursuant to Rule 12(b)(1) on the grounds that the Court lacks jurisdiction over the subject matter because

1 the issue is not ripe for judicial review. Doc 26.

2 **I. Ripeness**

3 First, the Court turns to Defendants' ripeness arguments under 12(b)(1).

4 The ripeness doctrine seeks to distinguish matters that are premature for judicial review
5 because the injury is speculative and may never occur from those cases that are
6 appropriate for federal action. *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir.
7 2010), *see also* E. Chemerinsky, *Federal Jurisdiction* 2.4.1 (4th ed.). The Court's "role is
8 neither to issue advisory opinions nor to declare rights in hypothetical cases, but to
9 adjudicate live cases or controversies consistent with the powers granted the judiciary in
10 Article III of the Constitution." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d
11 1134, 1138 (9th Cir. 2000).

12 Ripeness has both a constitutional and a prudential component. *Id.* At 1138.
13 Under the constitutional component, the court considers "whether the plaintiffs face a
14 realistic danger of sustaining a direct injury as a result of the statute's operation or
15 enforcement," or whether the alleged injury is too 'imaginary' or 'speculative' to support
16 jurisdiction." *Id.* At 1139. The constitutional component of ripeness is the same or similar
17 to the injury in fact prong of standing. *Id.* Prudential ripeness involves "two overarching
18 considerations: the fitness of the issues for judicial review and the hardship to the parties
19 of withholding court consideration." *Id.* At 1141.

20 Here, the Court is satisfied that this case is ripe for review. On December 28, 2016,
21 the Ninth Circuit issued its decision on Plaintiffs' appeal of the District Court's denial of
22 Plaintiff's Motion for a Preliminary Injunction. See Doc. No. 59. The Court held that
23 appellants' claims were constitutionally and prudentially ripe, rejecting Defendants'
24 arguments that the claims were not justiciable.

25 The panel weighed three factors in determining that the case was constitutionally
26 ripe: (1) whether plaintiffs articulated a concrete plan to violate the statute in question;
27 (2) whether the prosecuting authorities communicated a specific warning or threat to
28 initiate proceedings; and (3) the history of past prosecution or enforcement of the

1 challenged statute. See Doc. 59 at 15. As policy, “[t]hese factors allow for plaintiffs to
2 bring pre-enforcement challenges to laws that they claim infringe their fundamental
3 rights.” Id.

4 The panel reasoned that Plaintiffs’ pre enforcement challenge was appropriate
5 because Appellants explicitly stated they will not comply with the Act. The Court noted
6 this “pledge of disobedience” has been made though Appellants are aware that violators
7 of the Act are subject to civil penalties. In addition, the Court noted that the Attorney
8 General had not stated that she would not enforce the Act. Further, because the Act
9 did not go into effect until January 1, 2016, approximately one month before the District
10 Court heard the motion for a preliminary injunction, appellants were unable to
11 demonstrate a significant history of enforcement.

12 The Court also reasoned that the case was prudentially ripe. The Court held that
13 two factors merited consideration in determining prudential ripeness : (1) the fitness of
14 the issues for judicial discretion and (2) hardship to the parties if the it were to withhold
15 jurisdiction.

16 The Court held that here, both factors favored a finding of prudential ripeness. Id.
17 The Court noted that “this action turns on a question of law.” Id. “Appellants seek to
18 enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require
19 no further factual development.” Id. In addition, the Court held the parties would face
20 significant immediate hardships should the Court decline to exercise jurisdiction. Id. As
21 the Court noted, “without a decision, Appellants must continually choose between obeying
22 the law or following their strongly held convictions about abortion, and the AG will have
23 to choose whether or not to enforce a law without the benefit of a ruling on its
24 constitutionality.” Id.

25 Accordingly, in following the Ninth Circuit’s holding that the action is both
26 prudentially and constitutionally ripe, the Court’s **DENIES** Defendants’ motions to
27 dismiss under 12(b)(1).
28

II. Standing

Next, the Court addresses Defendants arguments under the standing doctrine of 12(b)(1). A necessary element of Article III’s “case” or “controversy” requirement is that a litigant must have “‘standing’ to challenge the action sought to be adjudicated in the lawsuit.” *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000).

The “irreducible constitutional minimum” of Article III standing has three elements. *LSO*, 205 F.3d at 1152 (internal quotations omitted). First, plaintiff must have suffered “an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted). Second, plaintiff must show a causal connection between the injury and the conduct complained of; *i.e.*, “the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976))(alterations in original). Third, it must be “likely,” and not merely “speculative,” that the plaintiff’s injury will be redressed by a favorable decision. *Id.* at 561. If the Court finds plaintiff lacks Article III standing, it must dismiss plaintiff’s claim for lack of subject matter jurisdiction under Rule 12(b)(1). *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1127 (C.D. Cal. 2012).

The doctrines of “standing and ripeness are closely related, in that the application of either is intended to “prevent courts from becoming enmeshed in abstract questions which have not contritely affected the parties.” *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978); *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm’n*, 659 F.2d 903, 915 (9th Cir. 1981), *aff’d sub nom. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

1 Here, two Defendants make claims under the standing doctrine of 12(b)(1). First,
2 Defendant Foley argues that Plaintiff's lack standing to sue because Plaintiffs' complaint
3 fails to allege facts that demonstrate that they have suffered or will suffer any injury as a
4 result of the challenged portion of the Act or that the likelihood of any alleged injury will
5 be redressed by a favorable decision. Doc. 19 at 10. Defendant Foley argues that there has
6 been no injury in fact that is concrete and particularized or actual or imminent. Id. In
7 addition, Defendant Foley argues that there must be a genuine threat of imminent
8 prosecution. Foley also argues that any facial challenges to the act cannot be brought
9 against Foley as the City Attorney for the City of El Cajon as he did not draft or enact the
10 Act. Doc. 19 at 6.

11 Defendant Brown argues that Plaintiff lacks standing to sue Brown in his official
12 capacity as governor of the State of California. Brown argues that "the Eleventh
13 Amendment bars suit against a state or its instrumentalities for legal or equitable relief in
14 the absence of consent by the state or an abrogation of that immunity by Congress." Doc.
15 No. 25 at 10. Brown contends the Eleventh Amendment bars suits against state officials
16 when the "state is a real, substantial, party in interest." Id. Brown posits that a limited
17 exception under *Ex Parte Young* applies when "such officer must have some connection
18 with the enforcement of the act, or else it is merely making him a party as a representative
19 of the State, thereby attempting to make the State a party." 209 U.S. 123 (1908), Id.

20 Brown points to Plaintiffs' complaint, which names him as a party "simply because
21 he is the Governor...and chief executive of the State of California." Compl 26. Brown
22 argues that Ninth Circuit case law supports dismissing the action against him. Brown
23 argues that in *Long v. Van de Kamp, supra*, the operators of a motorcycle shop sued the
24 Attorney General, seeking to enjoin him from enforcing the statute. The Ninth Circuit
25 directed dismissal on the basis of the Eleventh Amendment, noting that a connection, or
26 threat of enforcement, must exist between the official sued and enforcement of the
27 allegedly unconstitutional statute. *Long*, 961 F.2d at 152.
28

1 Defendant Brown argues that here, the circumstances are similar to *Long*. The
2 complaint, Defendant argues, alleges no connection between the Governor and
3 enforcement of the Act. Defendant posits that the Act authorizes three officials other than
4 the Governor to enforce its provisions once it becomes effective.²

5 This Court finds that, echoing the panel’s reasoning, Appellants have alleged
6 standing sufficient to meet the threshold justiciability prong laid out in *Lujan v.*
7 *Defenders of Wildlife* 504 U.S. 555(1992). Much like the doctrine of ripeness, the
8 standing doctrine requires the Court to analyze whether there has been a direct injury.
9 *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000)
10 (“measuring whether the litigant has asserted an injury that is real and concrete rather
11 than speculative and hypothetical, the ripeness inquiry merges almost completely with
12 standing” citing Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L.Rev.
13 153, 172 (1987)).

14 Here, the panel noted that pre-enforcement challenges have long been
15 recognized, a lack of enforcement history does not compel a lack of genuine threat of
16 imminent prosecution, and the parties face immediate and significant hardship as
17 “appellants must routinely choose between holding fast to their firmly held beliefs
18 about abortion or complying with the Act.” Doc. 59 at 15, 17. Therefore, this Court
19 finds that Appellants have alleged standing sufficient to challenge the Act.

20 As to Defendant Foley, this Court finds that Foley is a proper Defendant. Foley
21 posits that as the City Attorney for the City of El Cajon, he did not draft or enact the
22 Act, and as a result is not a proper defendant. However, the Ninth Circuit noted that
23 “the Act grants the City Attorney the power to enforce the Act...The City Attorney,
24 therefore is a proper defendant.” Doc 59 at 12, fn. 2.

25 As to Defendant Brown, this Court agrees with Brown and finds that he is not a
26 proper defendant. Unlike the case of Defendant Foley, Plaintiffs allege no specific
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28 ² Defendant Brown also argues that there is no threat of enforcement. Per the
Ninth Circuit’s decision, this Court disagrees.

1 connection between Defendant Brown and enforcement of the Act. The Court finds
2 there is no threat of enforcement sufficient to name Brown as a proper defendant, or to
3 find an exception akin to that of *Ex Parte Young*. Brown does not enforce the Act and
4 does not stand to do so in the future. Brown's general responsibility to enforce
5 California laws as its Governor does not give rise to the requisite enforcement
6 connection needed to name him as a Defendant. *Nat'l Conference of Pers. Managers,*
7 *Inc. v. Brown*, 690 F. App'x 461, 463 (9th Cir. 2017)

8
9 **CONCLUSION AND ORDER**

- 10 1) Motions to dismiss filed by Defendants' Becerra, Montgomery, and Foley
11 (Doc. Nos. 8, 19, 26) are DENIED;
12 2) Defendant Brown's motion to dismiss (Doc. No. 25) is GRANTED;
13 3) The remaining Defendants' shall file an answer to the Complaint within the
14 next forty-five (45) days from the date of this Order.

15 Dated: September 29, 2017

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18 JOHN A. HOUSTON
19 United States District Judge
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